

# Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization

By  
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The need and potential for lawyers to have a positive impact on global governance, human rights and environmental protection has never been greater. Recurrent financial instability in global markets, threats to the sustainability of global capitalism and governance, pressures on international human rights and the rule of law itself, and global climate change with its unprecedented risks to the planet and its species, all combine to make it imperative that legal professionals advising and engaging in various ways with global business incorporate this larger practical and ethical context.

Those imperatives have lately resulted in a constellation of forces coming together under the name of Corporate Social Responsibility (“CSR”)—sometimes more colloquially known as “Corporate Scandal Response.” Recognizing the need to ameliorate the worst negative social and environmental impacts of global business activity, and to harness the power of multinational corporations to help solve the pressing (and even existential) problems facing the planet and its people, businesses have joined with governments, nongovernmental organizations, unions, and bar associations.<sup>1</sup>

In this Article I propose a model for “CSR Lawyering” that responds not only to social imperatives, but also to opportunities to build value and competitive advantages for business enterprises. I begin with a brief survey of the geopolitical currents that drive demand for CSR and then, more particularly,

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1. The American Bar Association, the Council of Bars and Law Societies of the European Union (CCBE), the International Bar Association, and many other national, regional, and local bar associations have over the last decade formed committees to study and make recommendations on how their members can more effectively contribute to corporate social responsibility.

the demand function for CSR *lawyering*. To this end I recount ways in which CSR influenced my own career, and produced optimized outcomes for my clients as well as other stakeholders. I then explore the increasing ubiquity of CSR and the concomitant explosion of opportunities for lawyers – whether working within an NGO, as in-house counsel, or advising a client whether to litigate a legal right. Next, I demonstrate the falsity and irrelevance of the debate over whether CSR is properly considered “legal” or is merely “voluntary.” Given the practical consequences of failing to comply even with so-called “voluntary” principles, lawyers cannot afford to ignore such standards in advising their corporate clients. In fact, I submit, not only do rules of professional ethics leave room for “CSR Lawyering,” but neglecting to account for CSR principles in a representation may actually amount to a *failure* of professional responsibility. Finally, I identify and examine the skills conducive to successful “CSR Lawyering,” and sketch a model that steers a moderate middle ground between the “Legal Enabler” and public-interest-enforcer extremes.

It is important at the outset to emphasize that this is not a call for businesses to replace or step into the shoes of governments, which appropriately retain the primary duties and responsibilities under international law to address human rights and environmental ills and achieve vital progress. But global businesses and the lawyers advising them just as indisputably have critical roles to play.

## I.

### THE DEMAND FOR CORPORATE SOCIAL RESPONSIBILITY

This renewed call for common and effective global norms and actions to address the increasingly global major problems facing all of us – including promoting public goods like human rights, the rule of law, and environmental protection, and reducing global dangers like growing inequality, persistent poverty, massive hunger, spreading disease, climate change, refugee flows, terrorism, conflict, and war – comes at a time of resurgent appreciation for international law’s potential in the wake of the unfortunate hostility levied by the George W. Bush administration. Whether in diluting global standards pertaining to torture, repudiating important global initiatives such as the Kyoto protocol and the International Criminal Court, or relaxing standards for going to war, the common theme has been failure on the part of the powerful to recognize the practical and ethical benefits of accepting sensible cooperative limits on the exercise of power.

The related reaffirmations of the importance of international law, from across the world as well as the domestic political spectrum, were a predictable response to such excesses. Of the hundreds of notable instances, take just two from U.S. Supreme Court justices appointed by presidents representing the two different major U.S. political parties. Former Justice Sandra Day O’Connor in a

speech at Georgetown a few years ago said that the enhanced relevance of international law was:

. . . a concern for the lawyer counseling her client on issues ranging from commerce to the environment, family law, human rights, immigration and intellectual property. International law is no longer an issue only for diplomats and trade lawyers. With increasing globalization, international law affects business and litigation decisions across the board.<sup>2</sup>

Her colleague Justice Stephen Breyer has pointed out even more succinctly and directly “the truth about the world, which is that of course business is international; of course law is more and more international; and of course, human rights, too, are more and more international.”<sup>3</sup> This places an onus on lawyers to know at least about the broad patterns and basics of international law, of common and civil law systems, the continued differences as well as the increasingly shared human rights values underlying the legal systems, and the major role played by transnational corporations in shaping those laws and values. In some jurisdictions the myth that laws and institutions are objective and value neutral persists, with lawyers viewed as technocrats merely applying the rules to fact patterns; but in most developed countries, at least, that myth has long been obliterated. Recognizing the subjective value judgments involved opens space for critical scrutiny and action aimed at incorporating more appropriate and sustainable values.

## II.

### CSR'S INFLUENCE AND POTENTIAL: ONE LAWYER'S EXPERIENCE

I vividly observed these rapidly converging global norms in my own legal career, which has spanned private practice in a major global law firm, an in-house legal role including responsibility for a major multinational telecommunications company's human rights and corporate citizenship policies, and in recent years, teaching law and business students the relevance and interrelationship (as well as the not-infrequent tensions) between bodies of international trade, corporate, project finance, and intellectual property laws, on the one hand, and international human rights and environmental laws and norms, on the other.

At the outset of my career more than twenty-five years ago, before the word if not the phenomenon of “globalization” was recognized as such, I never expected to see the synergies and reciprocal relevance of these seemingly divergent areas. My international and domestic litigation and transactional matters handled for the private law firm's corporate clients seemed at first worlds apart from my pro bono human rights work for victims of apartheid in

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2. Sandra Day O'Connor, *Keynote Address, Dedication of the Eric E. Hotung International Law Center Building, Georgetown University Law Center*, 36 GEO. J. INT'L L. 651, 652 (2005).

3. *The Relevance of Foreign Law for American Constitutional Adjudication* (C-SPAN television broadcast Jan. 13, 2005).

South Africa, refugees and asylum applicants fleeing Central America, HIV/AIDS patients seeking legal assistance, and women and children fleeing trafficking. While client interview, analytical, communication, drafting, and advocacy skills seemed relevant to both realms, the realms seemed as different from each other as love and money.

Then, gradually but with gathering force, the points of intersection started to appear. J.C. Penney International's CEO called up to ask what to do about Guatemalan protesters clamoring outside its corporate offices about sweatshop conditions. American Airlines sought advice on maximizing the brand benefits from its philanthropic programs through various global trademark and intellectual property strategies. Starbucks and The Body Shop wanted to take human rights into account in their international transactions, but were criticized for not "walking the talk." Radisson Hotels, TGI Friday's, and other franchisors had to deal with concerns that they were harming indigenous culture by spreading American monoculture and locating in historically sacrosanct areas. A yogurt franchisor suddenly had to deal with another form of culture: avoiding the unsafe yogurt cultures prohibited under the global Codex Alimentarius food safety standards. Energy companies and other multinationals sought advice on dealing with demands for bribes from corrupt local officials who wanted to divert funds from public health, education, and welfare to private use, not to mention indigenous peoples concerned about the environmental and human rights impact of drilling and pipeline projects. Various clients expanding into Mexico and Canada wanted the benefits of enhanced access that came with NAFTA, but were aware of substantial resistance on human rights and environmental grounds.

Without my intending, CSR issues suddenly became a notable part of my practice, regularly affecting my corporate clients' attempts to expand globally and requiring creative solutions, both sensible and sensitive, in order to solve pending and avoid future problems. Nominally specializing in a private international legal practice, I saw the famous public/private distinction blur before my eyes as mediating between private and public interests became a significant aspect of my professional life.

When I moved to Finland with Nokia, human rights and environmental issues initially played no role. But when Amnesty International, nascent socially responsible investors, and others asked about Nokia's commitment to responsible conduct, it came as no surprise when my CEO asked me to add global corporate citizenship to my portfolio. I thereafter led a participatory process resulting in a Code of Conduct and policies and procedures guaranteeing a strong commitment to the Universal Declaration of Human Rights and green conduct. Because Nokia arose in the Arctic Circle—where cooperation, human solidarity, and respect for the environment were not just laudable values but essential survival techniques – these efforts enjoyed a supportive reception among Nokia's executives, employees, and other stakeholders. This is not to say that there were not hard questions asked about what the commitments meant:

another Finnish virtue is honesty and not making promises on which one cannot deliver. But the fairly widespread consultation process resulted in a high degree of consensus that we could and should make the commitments to socially responsible, sustainable actions.

To this day, I believe that confirmation of those values, at the critical time when Nokia was expanding so widely around the globe, played a major role in reinforcing and crystallizing the company's ethical culture in ways that conferred enduring and vital competitive advantages, without in any way diminishing entrepreneurial initiative or productive risk-taking. Among those competitive advantages were energizing, motivating, and recruiting stellar employees, spurring innovative designs and technologies, nurturing trust and enthusiasm among all stakeholders, and building the global brand that represented Nokia's remarkable global business success.

### III.

#### CSR'S INCREASING UBIQUITY AND NEW OPPORTUNITIES FOR LAWYERS

Despite speed bumps like the stalled Doha Round of multilateral trade talks, the pace and penetration of globalization has only accelerated in the last decade, as have CSR norms. This decade has witnessed proliferating company and industry codes of conduct, global and sector-specific multistakeholder initiatives, monitoring standards and organizations, labeling and certification schemes, NGO-based guidelines, reporting standards, and legislative, judicial, and administrative law developments on an almost daily basis. Combined with the appointment of the U.N. Special Representative on Business and Human Rights and the growing popularity of the U.N. Global Compact, these developments demonstrate that, as *The Economist* magazine noted in its 2008 survey, "Clearly CSR has arrived."<sup>4</sup> China, of all places, amended its 2006 Company Law<sup>5</sup> to explicitly provide that companies shall "bear social responsibilities" (although it is an understatement to say that enforcement lags). The Chinese Securities Regulatory Commission's Corporate Governance Code confirms a stakeholder view,<sup>6</sup> as opposed to merely a shareholder view, for listed companies. Even the conservative Tory government in the United Kingdom is on board, with a new CSR strategy that goes beyond mere reliance on market forces to encompass what's described as "light" regulation.<sup>7</sup> CSR

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4. *The Next Question*, ECONOMIST, Jan. 19, 2008, at 8.

5. Company Law of People's Republic of China (promulgated by Presidential Order, Oct. 27, 2005, effective Jan. 1, 2006) P.R.C. LAWS, art. 5.

6. Requiring listed companies to respect the interests of "banks and other creditors, employees, consumers, suppliers, the community, and other stakeholders." Code of Corporate Governance for Listed Companies in China (promulgated by the China Sec. Reg. Comm'n, St. Econ. & Trade Comm'n, Jan. 7, 2001, effective Jan. 7, 2001), available at [http://www.ecgi.org/codes/documents/code\\_en.pdf](http://www.ecgi.org/codes/documents/code_en.pdf).

7. Conservative Party Working Group on Responsible Business, <http://www.conservatives>.

developments are happening so quickly today that business seems ahead of states, which must leave states feeling like the snail beaten up by the two turtles. The police ask the snail “did you get a good look at the turtles who did this?” The snail replies, “No, it all happened so fast!”

Lawyers are on the frontline in dealing with these issues both for corporations and for the other stakeholders affected by corporate conduct. This means that no lawyer interfacing with corporations, or working within one, can afford to be ignorant of CSR’s basic content, principles, and processes or the variety of existing soft and hard law instruments that can either cause problems and/or offer solutions when CSR issues and dilemmas arise. Environmental and human rights issues are now increasingly standard in due diligence for mergers and acquisitions. CSR reports from public corporations are increasingly commonplace. Human rights and environmental impact assessments are being used—and should be considered for broader use—in major investment and other corporate decisions across the board. As I will demonstrate later in this Article, neglecting to consider these issues will increasingly amount to failure of professional responsibility and of directors’ fiduciary duties.

Entire new legal careers are arising as a result of these developments. Lawyers are filling such positions as CSR vice-presidents and directors, public affairs and communications officials, compliance officers, business ethics professionals, supply chain management heads, sourcing chiefs and employees, and CSR consultants, among others, where they help implement CSR programs. In-house counsel and law firms advising corporations are increasingly having experiences like my own in which they find that CSR issues are encroaching on their regular practices, and that they must increasingly consider them when counseling, advising, negotiating, mediating, drafting, advocating, and litigating. Some of these professionals are actively nurturing and marketing those practices both as inside and outside counsel. Legislators and aides draft laws dealing with these issues. Executive agency officials help set policy, draft regulations, and enforce laws and regulations in this area. Law school deans and professors help inculcate the values that will shape entire generations of lawyers. NGO lawyers, directors, and employees help broaden the campaigns to assure further development and compliance with the standards. Ideally, a CSR leadership mentality and a strong ethical orientation should pervade all these roles.

## IV.

## CSR TRANSCENDS THE FALSE DICHOTOMY BETWEEN LEGAL AND “VOLUNTARY”

CSR is thus increasingly recognized as directly or indirectly “legal” in its implications and effects – and if the social and environmental expectations are not now formal law they certainly highlight the direction in which the law is evolving. But even formally “voluntary” duties are rarely purely voluntary, and lawyers therefore cannot afford to ignore them.

In fact, the voluntary/mandatory distinction is overblown and misleading on many levels. “Voluntary” commitments made by corporations, no less than individuals, are still commitments that in many ways can take on the character of “law” viewed more expansively. Sanctions of various sorts accompany such commitments, often lending them equal or greater normative force than law as a practical matter. If, for example, a company makes an important commitment on which it reneges, the consequences can include various forms of market rejection by consumers or investors, alienated employees or unions, a regulatory response by government, or even loss of the social license to operate in the eyes of the community. And this is before one considers a tremendously powerful yet often overlooked sanction: personal embarrassment of the company’s directors, lawyers, executives, and managers in the eyes of family and friends. Thus, companies tend not to make great distinctions in their CSR reports as to whether the standards they are complying with are “voluntary” or “mandatory,” or a matter of “law” or “ethics.” The commitment may thus be mainly “market” based (for example to avoid risk and attract socially responsible or other investment funds) or “ethical,” but its violation may have immense practical consequences, up to and including (depending on the importance of the broken promise) losses in stock price and brand value that would dwarf any likely legal penalty imaginable. In the extreme, as happened with Arthur Andersen in the Enron scandal, the violation of trust can even have the existential consequence of the enterprise ceasing to exist.

Beyond that, however, some nominally “voluntary” commitments have the greater weight of authority that comes from government involvement (as with the “soft law” OECD Guidelines for Multinationals and the ILO’s Tripartite Declaration).<sup>8</sup> The same applies to use by governments and domestic and international institutions to determine various rewards (as with government procurement advantages, other subsidies, export credit guarantees, or tax

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8. Organisation for Economic Co-operation and Development [OECD], *Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG (2000)15/FINAL (Oct. 31, 2001), available at [http://www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/\\$FILE/JT00115758.PDF](http://www.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF). See also, INTERNATIONAL LABOUR OFFICE, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (3d ed. 2001), available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

breaks)<sup>9</sup> or punishments (including benefits withheld) for compliance or noncompliance with various standards. This is the case, for example, with the human rights and environmental operational guidelines and performance standards of the World Bank and the International Finance Corporation.<sup>10</sup> Companies must meet these standards to qualify for funds both from the international agencies and the many banks that follow them as part of compliance with the Equator Principles,<sup>11</sup> as well as for a growing number of export control agencies and government insurance schemes for promoting trade, investment, and development. But whether contained in “external” codes drafted with or at the behest of governments, or in the hundreds of normative performance standards and reporting instruments produced by business groups and industry associations, NGOs, faith groups, and socially responsible investment groups,<sup>12</sup> there is little question that new and largely complementary standards have cumulatively served as sources of corporations’ own “internal” codes, policies, practices, procedures, and “law.”

Even voluntary commitments are made “in the shadow of the law.”<sup>13</sup> Voluntary commitments can form the standard of care legally expected (and litigable), especially if those commitments are broadly similar across a large number of individual corporate codes as well as industry codes. This is precisely what has been happening over the past several years in the human rights and environmental fields. Many “voluntary” standards incorporate binding law (as with parts of the UN Norms, for example).<sup>14</sup> The well-known role for voluntary and “soft law” instruments in paving the way for hard law—as happened for example when corporate “best practices” were formalized by Karl Llewellyn and others into the U.S. Uniform Commercial Code—makes it only prudent for lawyers and businesspeople to be aware of such instruments and take them into account. The voluntary standards both reflect social expectations and corresponding commitments and serve as signposts pointing toward where the

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9. The U.K. and other governments extend public procurement benefits based on compliance with such standards, and U.S. examples are various, ranging from lighter sentences under the U.S. Sentencing Guidelines for corporations demonstrating an ethical culture (U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2005)), to government subsidies for charitable donations of conservation easements (see, e.g., 26 U.S.C. § 170(f)(3) (2006)).

10. IFC Environment - Environmental and Social Standards, <http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards> (last visited Apr. 6, 2008).

11. The Equator Principles | A Benchmark for the Financial Industry to Manage Social and Environmental Issues in Project Financing, <http://www.equator-principles.com> (last visited Apr. 6, 2008).

12. Such principles include the classic and the new Sullivan Principles, the Caux Principles, the Interfaith Center on Corporate Responsibility’s Principles, the SA8000, and those of BLIHR.

13. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Cf. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

14. U.N. Econ. & Soc. Council [ESCOR], Sub-Comm’n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

“harder” law domestic and international standards are headed.<sup>15</sup>

The voluntary/mandatory distinction also vanishes when so-called voluntary standards are incorporated within binding contracts, thus forming a private law regime between the parties, and sometimes even a public law regime. This happens, for example, when voluntary standards are referenced in agreements between large multinationals and their suppliers, or when they are referenced in host agreements that actually become a “prevailing legal regime” binding upon the parties – even being ratified as binding treaties among the governments involved. This is what occurred, for example, in cases such as the huge cross-border project-financed BTC Pipeline case.<sup>16</sup> CSR standards are also frequently incorporated in other agreements between mining and forestry companies and host governments so as to become part of the binding and enforceable legal regime. This route from voluntary to mandatory is especially relevant to lawyers. By their daily actions, lawyers around the world working in myriad capacities help create such private and public legal regimes through the cumulative effect of their bottom-up structuring, drafting, negotiation, advocacy, dispute resolution, and institution-building activities. As the legal process schools have noted, these bottom-up processes (more than top-down command and control regulation) actually form the main drivers in the creation of law.<sup>17</sup>

So while there has been a concerted effort<sup>18</sup> to label CSR as strictly “voluntary,” that effort is now increasingly seen as inaccurate, outdated, futile, and irrelevant. Responsible conduct of course begins with minimum legal compliance, but it just as surely transcends this minimum to encompass areas of

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15. Another example is the recently proposed U.S. legislation known as the “Decent Working Conditions and Fair Competition Act” (which would prohibit the import, export, or sale in the United States of goods produced with abusive child or sweatshop labor that fails to respect local labor laws in the country of production or internationally recognized core labor standards). This bipartisan bill contemplates private plaintiffs being enabled to sue companies engaging in unfair competition or deceptive trade practices as a result of their having procured goods from other businesses that have violated core labor standards or international human rights. The Federal Trade Commission would be charged with investigating worker complaints alleging violations of the law. Decent Working Conditions and Fair Competition Act, S. 3485, 109th Cong. (2006).

16. See U.N. Global Compact & U.N. Off. of the High Comm’r of Human Rights, *Embedding Human Rights into Business Practice*, <http://www.ohchr.org/Documents/Publications/Embeddingen.pdf> (last visited Apr. 6, 2008).

17. See, e.g., Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602-3 (1997); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC’Y INT’L L. PROC. 240, 242 (2000).

18. Such efforts have been successful to some extent, particularly in Europe. See Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 8, COM (2002) 347 final (July 2, 2002), available at [http://europa.eu.int/comm/employment\\_social/soc-dial/csr/csr2002\\_en.pdf](http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf) (deferring to the views of those segments of the corporate lobby that insisted on defining CSR as voluntary).

action that are not easily or wisely pigeonholed as “merely voluntary.” Legal regimes at various levels setting forth norms of environmental and social protection—ranging from nondiscrimination to prohibitions on false advertising—provide a background and context for business decisions and action that lawyers must consider when counseling and litigating. NGOs and advocacy organizations exploiting these more fluid boundaries between legal and social norms may at times appear as adversaries, but may also be serving in effect as unpaid consultants to the corporation, playing a vital social role that inures to the business’s long-term benefit by explicating the social expectations that form the contemporary business milieu.

Thus, in issuing its CSR guidelines<sup>19</sup> for the more than half a million lawyers it represents, the Council of Bars and Law Societies of the European Union (CCBE) highlights the special opportunity lawyers have to advise on CSR issues as a result of their influence and ready access to corporate boardrooms. When the guidelines were adopted in 2003, the CCBE President said “Corporate Social Responsibility is widely accepted today as a vital part of corporate life. The CCBE intends to play a leading role in the promotion of Corporate Social Responsibility in ensuring that lawyers understand its importance when advising clients.”<sup>20</sup>

Rather than a merely voluntary regime, therefore, what we are seeing emerging is in essence a new *customary global law* for responsible business action – “global” rather than “international” because it involves not just nations but non-state actors.<sup>21</sup> Professor Ralph Steinhardt identified elements of this phenomenon several years ago when he described the currents feeding into a new “lex mercatoria” or law of merchant akin to that applying to medieval guilds and bodies corporate.<sup>22</sup> Professor Andrew Clapham also described in 2006 the extensive new body of human rights obligations on non-state actors (including corporations) that had arisen in the years since he wrote his first book on the subject just more than a decade earlier.<sup>23</sup> It would be a mistake to describe this body of norms as merely “optional” when noncompliance could result in penalties in fact up to and including losing the corporate license to operate, and more practical sanctions such as the public humiliation of the

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19. CORPORATE SOCIAL RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION (2005), available at [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/csr\\_guidelines\\_0405\\_1\\_1182254964.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/csr_guidelines_0405_1_1182254964.pdf)

20. Helge Kolrud, President, CCBE, *quoted in* Hans Corell, Address to the American Bar Association Section of Business Law, 2004 Midwinter Council Meeting, at 7, (Jan. 17, 2004), available at: [http://www.un.org/law/counsel/english/address\\_17\\_01\\_04.pdf](http://www.un.org/law/counsel/english/address_17_01_04.pdf).

21. Cf. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005).

22. Ralph Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 177 (Philip Alston ed., 2005).

23. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

corporation's executives.

## V.

### CSR AND THE LAWYER'S ETHICAL DUTIES

These new realities recommend ethical, socially conscious and environmentally aware lawyering, with the lawyer advocating business actions that make sense both for the business client or counterparty *and* for the long-term, best interests of society and the environment. In-house lawyers, in addition to "zealous advocacy," are concerned with internal policies and mechanisms designed to assure compliance with external law, and helping to manage risks of corporate litigation and liability (including anticipating and resolving issues, stakeholder concerns, and various disputes). In recent years that role has expanded to recognize a more explicit role in protecting the brand and good name of the corporation (which, after all, represents one of if not the main components of corporate value). This reputation-assurance function may require an even more expansive vision of the law that encompasses the realities described above, the emerging trends in the law, and even the "spirit" of the law. The standard view of lawyer as zealous advocate entitled to press her client's cause without regard for the justice of that cause—to advance conduct that, if technically legal, undermines the goals or spirit of the law—is wrong. The corrective to that, in part—for lawyers as well as all corporate employees and stakeholders—is to consider the goals and spirit of the law as well. (General Electric's ethics code is called the "The Spirit & the Letter" in part to serve as a reminder of this). Beyond even the "spirit of the law" are moral values such as: integrity, honesty and good faith, respect for dignity, encouragement of individual autonomy, tolerance for dissent, nondiscrimination, fair treatment, achievement and self-expression, teamwork and solidarity, respect for the environment, openness and transparency, and accountability – the kind of values found both in the global human rights regime and across good businesses and good societies.

Good, authentic leadership is inherently moral,<sup>24</sup> reflecting such values. What is emerging is a greater leadership role for lawyers in guiding ethical decision-making (including strategy, spotting issues, asking questions, helping analyze costs/benefits, resolving dilemmas, seizing opportunities) and ensuring an ethical culture. For example, General Electric's current General Counsel, Brackett Denniston, played a leading role alongside the Vice-President for Corporate Citizenship Bob Corcoran in this complex global corporation (with well over 330,000 employees and worldwide operations), adopting a strong policy affirming the corporate commitment to the Universal Declaration of

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24. See, e.g., the essays in *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* (Deborah Rhode ed., 2006) (hereinafter *MORAL LEADERSHIP*).

Human Rights,<sup>25</sup> just as former General Counsel Ben Heinemann so effectively emphasized integrity as the basis of GE's ethical culture.<sup>26</sup> Such lawyers are critical but creative, not obstructionist, possess the vision enabling them to see social norms and expectations arising from over the horizon, and how responding to and reinforcing the authoritative pull of the rule of law and international human rights norms adds strategic value to the enterprise.

Such an ethical culture is increasingly required both by laws and by markets.<sup>27</sup> Given the enhanced levels of global scrutiny prevailing, such a culture amounts to a "basic competitive requirement" for all successful businesses. It is also a competitive advantage for many (especially in terms of "business case" benefits such as reducing risk; recruiting, retaining, and motivating better and more productive employees; attracting customers and maintaining customer loyalty; accessing both socially responsible and mainstream investment capital; enhancing stakeholder relations; and achieving long-term sustainable success for shareholders and all stakeholders). In addition to such practical concerns, an ethical duty arises from the enhanced power of transnational corporations globally and that of lawyers advising them. Transnational corporations now have the power—under regional and bilateral investment treaties for example—to appear directly as private parties (as opposed to the traditional proxy appearances by or at the initiation of states) before supranational dispute resolution enforcement tribunals dealing with trade, investment, and intellectual property matters. No corresponding right to effective dispute resolution of this sort generally exists for victims of human rights violations or environmental degradation. Whether from secular ethical philosophy, the book of Luke in the New Testament, sacred texts from other traditions, or the movie "Spiderman," the lawyer should recall that "with power comes responsibility."

Scientists, pediatricians, psychologists, psychiatrists, and ethics theorists all speak of the evolution of moral sensibility, and stages of moral development.<sup>28</sup>

25. See General Electric's Statement on Human Rights, available at <http://www.ge.com/company/citizenship/humanrights/index.html>.

26. Ben W. Heineman, Jr., *Avoiding Integrity Land Mines*, HARV. BUS. REV., Apr. 2007, available at [http://blogs.law.harvard.edu/corpgov/files/2007/11/hbr\\_heineman\\_avoiding-integ.pdf](http://blogs.law.harvard.edu/corpgov/files/2007/11/hbr_heineman_avoiding-integ.pdf).

27. A corporate culture in the United States must be ethical in order to reap the benefits of lighter sentencing. See generally US SENTENCING GUIDELINES MANUAL (2007), available at <http://www.ussc.gov/guidelin.htm>; see also Memorandum from John Sherman, Deputy General Council, National Grid to Andrea Shemberg, Legal Officer, Int'l Econ. Relations Programme, Int'l Comm'n of Jurists, *Human Rights Implications of the 2004 Amendments to the US Sentencing Guidelines for Organizational Defendants*, (June 7, 2006), available at [http://www.ibanet.org/images/downloads/ppid/Memo\\_ICJ\\_%20Paper\\_%20Final.pdf](http://www.ibanet.org/images/downloads/ppid/Memo_ICJ_%20Paper_%20Final.pdf). Ethics codes are also increasingly required by various stock exchanges, e.g., the business ethics and conduct requirements of NYSE Euronext, available at <http://www.nyse.com/lcm/1078416930909.html?enable=section&number=3&ssnumber=303A.00>.

28. See, e.g., LAWRENCE KOHLBERG, FROM IS TO OUGHT: HOW TO COMMIT THE NATURALISTIC FALLACY AND GET AWAY WITH IT IN THE STUDY OF MORAL DEVELOPMENT (1971); see also LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984) (describing six stages of moral development).

Many also note a “gap” in which organizations (such as corporations) lag a full stage behind individuals. Certainly, there are many examples of moral deflection by which individuals fail to apply to the groups they are in the same standards they believe they apply to themselves, using the group as an excuse to act in ethically problematic ways. The initial moral development models applicable to individuals have now been improved by our enhanced understanding of gender differences and insights from neuroscience about the role of emotion in learning and reasoning. More sophisticated models have been applied to stages of organizational moral development as well. Simon Zadek, for example, describes a five-stage process, running from (1) denial (“it’s not our responsibility”), to (2) compliance (“we’ll do just as much as we have to”), to (3) managerial (“our core business will manage the problem and the solution”), to (4) strategic (“we’ll get a competitive edge”), to (5) “civil” (“we’ll make sure others do it”).<sup>29</sup> Lawyers also play different roles that (perhaps unfairly) may be roughly analogized to such stages of moral development, ranging from (1) denial and defense (often the position of litigators defending the company), to (2) compliance with legal minimums (often a “check-the-box” approach that elevates form over substance), to (3) risk management that involves a broader and more reflective view, to (4) proactive and strategic thought partner and leader with regard to the company, to (5) proactive and strategic thought partner and leader with regard to society. Clients and objective situations drive the roles that lawyers play, and any given lawyer will shift between these roles from time to time, even on a given matter. All things being equal, activities toward the proactive and strategic end of the spectrum are generally advantageous.

Is the classic professional duty of “zealous representation” an insuperable obstacle to such lawyering? As the CCBE position set forth above suggests, the answer is “no.” Yet too many lawyers, and even law students graduating today, continue to mistakenly think so. It should be obvious that the notion of lawyers giving up their basic humanity and ethics just because of their professional status is both wrongheaded and dangerous; on the contrary, notions of ethics have always infused even the special professional responsibility regimes applying to lawyers. The American Bar Association’s Model Rules clarify that ethics do retain a role even from the narrower professional standpoint. According to the preamble, “[a] lawyer . . . is a representative of clients, *an officer of the legal system and a public citizen having a special responsibility for the quality of justice.*”<sup>30</sup> The duties to the client are thus complemented by duties to the rule of law, legal system, the wider community, and to justice itself. Law firms are themselves businesses subject to CSR requirements, with the added push toward CSR that comes from the role of lawyers in advancing justice.

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29. Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125.

30. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT pmb1. para. 1 (2007) (emphasis added), available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

A concern for justice inevitably implicates ethics, environmental responsibility, domestic civil liberties, international human rights, and international law. In representing clients in whatever role, therefore, lawyers are obligated to keep those concerns in mind. (Law schools should do the same). This of course requires lawyers to refrain from counseling or assisting clients with crimes or fraud,<sup>31</sup> presumably including human rights violations or environmental pollution or assisting with cover-ups of the same. But more affirmatively, this also requires lawyers to render “independent” judgment and “candid” advice—duty that explicitly allows the lawyer to bring in moral and political considerations (including those relevant to human rights or the environment) to bear on legal problems.<sup>32</sup> Such judgment and advice should always be given keeping in mind the right answer to the question “who is the client”: not the management or directors seeking the counsel—even if they may have power over the lawyer’s advancement within the corporation or even remaining employed— but the *extended enterprise* that constitutes the corporation itself.<sup>33</sup> So the very pressing temptation to give answers that may satisfy the executive asking the question, or the manager whom an in-house counsel often works with, should be resisted if those answers may work against the long-term interests of the client properly defined. This is easier said than done, but important to do nonetheless.

There are other legal ethics rules relevant here, including the requirement to escalate knowledge of conduct that may result in legal violations likely to cause substantial injury to the corporation (unless the lawyer believes this is not in the best interests of the organization).<sup>34</sup> This provision allows the lawyer to take a

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31. *Id.* § 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”).

32. *Id.* § 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

33. *Id.* § 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”). This is not the place to engage in the debate over whether the corporation is best equated narrowly with its shareholders, or whether as Edwin Dodd finally persuaded Adolph Berle in their famous Harvard Law Review debate, with the broader interests of stakeholders and society in general, except to say that the author deems the narrow shareholder primacy view as both historically inaccurate as a matter of law even in the United States, and empirically inconsistent with both enlightened, long-term shareholder value and the more socially productive stakeholder view. See Edwin Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148, 1161 (1932). Compare the U.K. government’s explanation that the new 2006 Companies Act enshrines in law “Enlightened Shareholder Value” for the practical reason that long-term success is best promoted when businesses take into account broader stakeholder interests such as those of employees and the environment. See Government of the United Kingdom, *Policy and Legislation-UK*, available at <http://www.csr.gov.uk/ukpolicy.shtml>.

34. *Id.* § 1.13(b) (“If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a

view of the corporation as an extended enterprise, including its stakeholders, to protect the entity from risks and liabilities. Yet another is the rule allowing lawyers to reveal even privileged information if necessary to prevent reasonably certain death or substantial bodily harm, a crime or fraud,<sup>35</sup> and in other limited circumstances. But the point is that there is significant room to take a truly broad ethical view in the larger interests of the corporation and society; the rules of professional conduct should not hinder ethical action.

## VI.

### CSR IN LEGAL PRACTICE

Now that it is clear that a lawyer may raise these issues, the question becomes how to do so effectively, whether one is an in-house lawyer, an outside corporate lawyer, or even for example a lawyer from an advocacy organization trying to influence business conduct in a desired direction. There are many different roles that lawyers might play with reference to business, as mentioned above, but in all of them they have to be a bit schizophrenic. Lawyers are part of society no less than the businesses they deal with or represent. They want to facilitate deals that are good for the company and society, but challenge deals that could harm the company or others.

On the business side, lawyers aren't there to bless shady or harmful deals, despite what some clients think or Justice Potter Stewart's famous remark about the ethics of the business lawyer being the "morals of the market place."<sup>36</sup> I love the story about how legendary international lawyer Elihu Root reflected this schizophrenia. Root said "[a]bout half the practice of a decent lawyer consists in

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matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law." While focusing on law as opposed to ethics, and imperfect in other respects, the escalation procedure contemplated does give the lawyer some notable room for maneuver.

35. *Id.* § 1.6(b)(1)-(2):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; . . .

36. Hon. Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 BUS. LAW. 463, 467 (1975) ("the ethics of the business lawyer are indeed, and perhaps should be, no more than the morals of the market place").

telling would-be clients that they are damned fools and should stop.”<sup>37</sup> But he also said “The client never wants to be told he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.”<sup>38</sup> “How,” here—I would like to think—includes ethical and CSR considerations. As Dean Harold Koh of Yale Law School has noted with respect to international human rights (and the same could be said regarding environmental considerations):

[A] lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it. Once one comes to understand the process by which international human rights norms can be generated and internalized into domestic legal systems, one acquires a concomitant duty . . . to try to influence that process, to try to change the feelings of the body politic to promote greater obedience with international human rights norms.<sup>39</sup>

On the non-business advocacy side, NGO and public interest lawyers must recognize that successful CSR propositions have to be realistic and “work” for business. Requests, demands, legal proposals, or laws that are unrealistic even for responsible businesses are not sustainable and simply won’t succeed.

Being close to the business and knowing the facts and the law is now indispensable, even as this has become more challenging as a result of the burgeoning new developments and growing complexity all around. The trust that stems from obvious competence, thorough preparation, and good judgment is the best platform for successful persuasion and good outcomes. Certainly for business lawyers, but especially for NGO lawyers or advocates, this means disciplining oneself, despite all the other personal and professional pressures, to find time to routinely absorb at least major developments in the law and business that one would not ordinarily follow. I have counseled many an environmental and human rights NGO lawyer to read *The Financial Times* and *The Economist*, and many a corporate lawyer to read *Ethical Corporation* magazine and similar sources. Mastering the facts and the law in this more complex global field is tougher than ever, but cannot be neglected.

Creatively deploying the “business case” arguments relevant to the issue, assuming they apply genuinely and forcefully, is the foundation for incorporating CSR. Continual attention to the specific business benefits in the relevant context is difficult, because although CSR frequently saves costs (as with the massive savings available from more environmentally sensitive actions, attracting even a company like Wal-Mart to “go green” in recent years), sometimes CSR involves short-term costs or even longer-term costs, and ultimately the case is moral. But the more attention that one can muster to

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37. PHILIP CARYL JESSUP, ELIHU ROOT 133 (1938).

38. ROBERT TAYLOR SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS* 667 (1946).

39. Harold Hongju Koh, *How Is International Human Rights Enforced?*, 74 *IND. L.J.* 1397, 1416 (1999).

practical business and long-term benefits, the better. This begins with highlighting risks not otherwise perceived or sufficiently appreciated, but at its best it proceeds on to identify new opportunities to add value or competitive advantage via CSR. Lawyers are usually better at the former than the latter, needing little encouragement to gloomily ensure that every potential liability, downside, and cost is taken into account. They are not as well versed at describing the veritable cornucopia of benefits available as a result of CSR that can enhance the core assets of the business (including its brand, people, other stakeholder relationships, knowledge, and capacity to adapt and innovate). In terms of risk management, a focus on the full panoply of risks including non-financial and even existential is warranted, and may be especially necessary in strongly entrepreneurial, risk-taking corporate cultures (as with many technology, financial services, and other companies). In terms of potential benefits, new products, services, and even entirely new lines of business are often available with a little imagination. Indeed, General Electric even brands its multi-billion-dollar environmental efforts "Ecomagination."<sup>40</sup> Sometimes lawyers feel role-constrained in addressing such items, in which case they may need to call on their own diplomatic resources or those of other allies; but they must find ways to make sure that the message is heard if it's the right one.

Unfortunately, many lawyers still hinder the application of CSR principles and rob their companies of significant value by favoring the negative, risk-management side of this dynamic. As such they often represent the greatest obstacle within corporations to a more enlightened approach that puts the business on an energized path to seizing the advantages and opportunities available from an authentic CSR commitment. By taking the usual, excessively cautious approach stereotypically associated with lawyers as "deal killers," narrowly emphasizing confidentiality and fear of liability instead of the tremendous benefits of dialogue, openness, responsible, rights-aware, and simply humane action, the lawyers can sometimes do tremendous damage to their client's true, long-term interests and potential. Although risk management remains a core legal competency, sometimes taking more risks and being more entrepreneurial in the direction of CSR principles—such as respecting and trusting stakeholders, being open and transparent, investing in joint understanding and action or creative monitoring or auditing solutions—can actually accomplish desired objectives through better routes, and produce ancillary "business case" benefits like more engaged and highly motivated employees and other stakeholders.

Executives at The Gap, Inc. (including during this symposium) have relayed how the General Counsel was initially very skeptical of the level of data disclosed in the company's first CSR report. This report, however, received global acclaim and resulted in tens of millions of dollars worth of positive publicity for the company, more positive media "hits" than the company had

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40. See <http://ge.ecomagination.com/site/index.html>.

ever received, and huge recruiting and retention benefits. This enormous goodwill served, among other things, as a sort of insurance policy for the company when it encountered further CSR issues (including a now aberrational incident involving child labor in India during Autumn of 2007, which the company promptly and appropriately handled without the negative fallout and consequences that it would have experienced in the years prior to its CSR commitment).

A key lesson I have learned since beginning my professional life as a litigator – a lesson which sometimes comes as an epiphany to many lawyers and businesspeople – is that the risks of liability are often overstated, and the benefits of openness, ethical culture, honest and fair dealing understated. As different ethical teachers have noted in various ways: the best risk management device, the best way to seem good is in fact to *be good*. CSR can help achieve that in practice. While I was at Nokia, we were remarkably litigation free (except for strategic intellectual property litigation undertaken for other purposes). I have no doubt that this was attributable in large part to Nokia's culture, values, and the open, honest, and good faith fair-dealing practiced by the company and its lawyers, executives, and employees—whether in proactively anticipating and resolving customer issues in supply agreements or consulting with indigenous people in the Amazon rainforest prior to building a new plant in Manaus, Brazil.

## VII. CSR LEGAL SKILLS

One can thus speak of the “basic competitive requirements” of good CSR lawyering. These differ only slightly from good lawyering generally. Both ideally require some degree of smarts (intelligence, reason, capacity for skeptical and critical analysis even of one's own reason, practical wisdom, deliberative judgment, a flexible willingness to learn), basic honesty and integrity, self-confidence, tolerance for ambiguity and complexity (in mind and heart), oral and written communications ability, negotiation abilities, basic legal knowledge, research skills, and some knowledge of society, business, politics, and economics. To such an incomplete but illustrative cluster of basic skills one can now add the need to have a more global and comparative knowledge of all such subjects, specifically including at least some familiarity with international human rights and environmental law and the leading CSR standards and tools globally and in relevant sectors.

Beyond those basics, however, we may identify “critical success factors” for lawyers wishing to excel as CSR practitioners. Some have already been alluded to, including perhaps above all, *vision, empathy, and imagination*. These allow both rational and emotional understanding of values, positions of other parties (and even contradictory values within a given party, as individuals are often themselves conflicted on difficult questions), and trends affecting the wide

variety of corporate stakeholders (ranging from employees and customers, to suppliers and contractors, to indigenous peoples and local communities). Instead of automatically settling on short-term, instrumentalist solutions, the skilled CSR lawyer takes the additional time to deeply consider longer-term, collaborative possibilities, both good and bad, in a rich expanded view that includes not only worst-case scenarios (such as executives testifying before Congress, or a major stock decline), but also positive potential (such as new lines of business to serve, for example, the third of the world's population without electricity).

To this we might add a closely related skill—an *ethical sensibility*—which involves a willingness to take responsibility and be accountable. Lawyers, like businesspeople, have choices. And in practical reasoning—from ends to means, with choices among various courses of action—means matter. Both reason and passion can be harnessed to deploy *persuasive and rhetorical skills* including *storytelling* and *story-appreciation*. Storytelling abilities have classically been prized and used mainly by trial lawyers. Now there is rightly a new appreciation among businesspeople as well as the legal academy for stories: the empowering myths of one's own personal or group story as well as those of others. The truth is that we are a storytelling species, and the ability both to shape and to truly listen with empathy to compelling and authentic narratives that tie together human experiences can be as or more important than the ability to draft a contract or complaint. These abilities are certainly necessary for effective stakeholder engagement and analysis. When combined with emotional intelligence, strong *interpersonal skills*, and the ethical sensibility I have mentioned, these higher rhetorical abilities allow the sort of collective reasoning that can not only resolve disputes but proactively anticipate and avoid them. At their best, such rhetorical skills, as Aristotle said, create community.

Just about any situation—an advocate dealing with a corporation, a lawyer dealing with a client, two counterparties negotiating – is helped by a sincere and genuine desire to listen to and understand the other party's perspective, and a desire to work together in partnership to jointly solve problems. It is often better to ask questions and let people come up with their own answers than to make assertions or sketch threatening scenarios. Case studies from the corporation's own history, its "received learning" or "internal common law" can be helpful, as can analogous stories from other companies that have encountered such situations (whether well known cases, as with Shell's complicity in the execution of Ken Saro-Wiwa, which resulted in a complete turnaround in that company's policies and approach to CSR issues, or lesser known cases specifically researched for the purpose). Taking my cue from legal and business ethicists ranging from Professors Laura Nash,<sup>41</sup> Lynn Sharp Paine,<sup>42</sup> and

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41. See, e.g., Laura L. Nash, *Ethics Without the Sermon*, HARV. BUS. REV., Nov. 1, 1981, at 79-90 (1981).

42. See, e.g., LYNN SHARP PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND

Deborah Rhode,<sup>43</sup> a technique I've used with success is simply raising the question of how the situation would look from the other stakeholder's perspective; truly imagining what a given harm would feel like can be a powerful heart, mind, and eye-opener. Stories and language have much to do with values. As wordsmiths trained in dissecting and understanding and manipulating the nuances of language, lawyers have the ability to make especially valuable contributions in using language not to paper over conflicts but to help each party see the other's legitimate point of view and to embed a fair approach that ensures ongoing attention to those points of view in ways that contribute to enduring and sustainable solutions.

To improve their abilities in this regard, lawyers must exercise their ethical muscles by consciously looking for ways in their various roles to regularly engage in and encourage ethical reasoning and capacity building—reasoning that respects stakeholders and nominal “opponents” and the arguments made by these parties, uses empathy, examines alternative modes of decision, and recalls the instinct for justice that is all-too-often somehow lost in law school. In my own business and legal experience, teaching, and interviews of world-class business leaders on this topic, I have discovered that the best corporations (via executive leadership training, human resources, legal, CSR, compliance, and other departments) are increasingly using varieties of experiential learning—including role playing, theatre, literature, multimedia, story telling, field visits, scenario planning – to enhance these imaginative abilities and prepare in advance (to the extent possible) for the dilemmas of right versus right, or right versus business imperative, that will inevitably arise.<sup>44</sup> Although there is often no easy or right answer to such ethical questions, the lawyer can help by identifying the facts, values, norms, issues, and perspectives to be considered, and both the rational and emotional reasoning processes that can yield the right answer when possible, the ethically better answer when one is available, or at least the best answer one can give under the circumstances. Lawyers are already finding themselves mediating at times between management and the world, between shareholders and stakeholders, and between public and private interests. But the lawyer's role should not be reduced to a mere “balancing” of values: these functions require judgment & leadership, because they pertain to the questions of “who we are”—and who we will become.

Clearly these skills do not work in isolation but, to the extent they are present, reinforce each other in positive ways. Interdisciplinary knowledge and skills like these are vital parts of the CSR lawyer's toolkit for dealing with the new global realities, which (being so complex) benefit from a combination of

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FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE (2002).

43. MORAL LEADERSHIP, *supra* note 25.

44. Child development experts understand the value of scenario planning and role playing in changing the behavior of children. See, e.g., Alan E. Kazdin, *Tiny Tyrants: How to Really Change Your Kid's Behavior*, SLATE, Apr. 10, 2008, available at <http://www.slate.com/id/2188744/>. Similar techniques can prepare adults in advance for difficult situations.

what is over-simplistically called “right brain” (creative) as well as “left brain” (analytical) thinking—synergistic abilities to see and feel patterns between apparently unconnected events using the combined rational and emotional resources that neuroscience confirms as part of “intelligence.” Perhaps the renewed emphasis on such holistic, system-level perspectives stems in part from the large societies of the East once again coming “online” and becoming integrated with the global system in ways that they have not been for centuries, with the more communitarian and relationship-oriented philosophies, cultures, and ways of thought merging with the more individualistic Anglo-American approaches that were so dominant during the twentieth century. Just as civil law systems influence common law systems, and vice versa—often resulting in hybrids that display elements of each—China and India are influencing the West in ways only now coming to the fore.

But whatever the source, lawyers (like businesspeople and global citizens generally) would be well served to nurture such skills, whether as preparation for launching or responding to a global campaign on Facebook, negotiating and drafting a new technological standard or multi-stakeholder labor rights initiative, arguing before an arbitral tribunal, or participating in one of the even more innovative and customized alternative dispute resolution techniques emerging to bridge perspectives, values, and interests. Although such interdisciplinary, multicultural skills and approaches are not traditionally taught in law school, they are starting to be, and should receive more attention as they relate to the traditional and emerging legal, business, and global governance contexts. It is worth taking them very seriously indeed, as they already are critical determinants of success and will only grow in importance.

Finally, there are “competitive advantages” for CSR lawyers just as there are for businesses. Those include a *diverse background* and/or genuine *passion for diversity and inclusion* – of culture, religion, national origin, ethnicity, language and other factors – which can be an invaluable guide to better information, allowing higher quality decisions. *Language abilities*, in particular, serve as windows into whole new worlds of thought and feeling. *Expertise in CSR principles and instruments, and their application*, can also serve as a competitive advantage for both lawyers and their clients. Best practice crisis management and litigation approaches these days recognize that old-style blanket denials, circling the wagons, and aggressive refutations of claims are less likely to succeed (and could create greater risks) than human responses admitting imperfection but genuinely seeking to resolve issues in line with CSR principles. Lawyers can be vital intermediaries in helping other corporate executives understand the new context and respond effectively.

Having listed out some of the main basic competitive requirements, critical success factors, and competitive advantages for CSR lawyers, we can now see that they have much in common with those of global businesses generally: they are also good business.

VIII.  
CSR LAWYERING: A MODEL

One approach to lawyering is that of the “zealous advocate” which, as discussed above, has its limitations (including possible myopia about trends, system level considerations, moral and socio-political factors, and stakeholder interests that should be taken into account in order to take high-quality decisions and actions). This model assumes that lawyers will defer to management’s pursuit of short-term profits, without raising issues of long-term business or reputational impact or ethics of human rights (or environmental) harm. The model has also been described as that of “Legal Enabler”:

... what the average corporate lawyer follows to make a living at the law. Legal Enablers pass no judgment on corporate acts and take no position on the wisdom of business decisions. Instead, they provide morally neutral risk analysis. Their stock in trade is not legal judgment; it is legal rationalization.<sup>45</sup>

At the other extreme is the model that Ralph Nader and some others have urged on lawyers: to be enforcers of the public interest.<sup>46</sup> While this approach has the virtue of appropriately recognizing the lawyers’ “gatekeeper” role and the public duties to justice and CSR referenced above, it has the potential vice of turning lawyers into instruments of the state and jeopardizing the lawyer’s role as trusted client counselor, inverting the responsibility for decisions, and potentially putting the lawyer into an adversarial relationship with the client.

A better model reconciling these competing tendencies is what we might call the “CSR Lawyering” model. This approach embraces the special role that lawyers have in society to promote justice, human rights, protection of the environment and other aspects of the public interest – emphasizing the special obligation to affirmatively raise such issues and proactively initiate discussions of them – while acknowledging that these duties obtain within the context of concrete duties to the client. Some might quibble with the term “CSR” instead of e.g. “CR” (for Corporate Responsibility), on grounds that it may imply a possible dichotomy between the corporate responsibility to society and the corporate responsibility to investors. That is not the intent in use of the term CSR here. In fact, the “business case” for CSR—emphasizing that what’s good for society can also be good for shareholders—brings together these duties to the client and to the public interest that may otherwise sometimes be in tension. The lawyer may and should advance the long-term and broader interests of the true client (the corporation as a whole, including shareholders and other stakeholders, as opposed to merely individual managers or directors), without damaging the rule

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45. *It’s About Time: Corporate Responsibility Law Finally Makes Lawyers More Accountable*, Aug. 14, 2002, available at <http://www.upenn.edu/researchatpenn/article.php?379&bus>.

46. See, e.g., RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996); Joel F. Henning, *Corporate Social Responsibility: Shell Game for the Seventies?*, in *CORPORATE POWER IN AMERICA* 151, 151-70 (Ralph Nader & Mark J. Green eds., 1973).

of law, fundamental rights, the environment, or the extended enterprise. This model would revive the sense of law as a profession – a calling, with public as well as private responsibilities – while simultaneously conforming to current requirements that lawyers be well-informed and integrally connected and close to the business so as to proactively and flexibly respond to complex and ever-changing realities on the ground.

On this view, the lawyer's role – whether formally “in-house” or “outside”—partakes of the “moral leadership” described in Professor Deborah Rhode's book of the same name. Such a role resembles that of “rights-aware” businesspeople promoted by the United Nations and BLIHR,<sup>47</sup> and is also analogous to the role of corporate directors and other leaders in promoting the broader and long-term interests of the corporation seen from the standpoint of all stakeholders, not merely shareholders.<sup>48</sup> Again, lawyers as well as businesspeople today benefit both practically and ethically from being informed and compassionate global citizens—realizing that in terms of the “big picture,” the continued unsustainable trends of growing inequality and persistent poverty mean a shrinking middle class in relative terms, and markets narrowing instead of reaching their potential, while also presaging greater conflict (including at the extremes, war and terrorism) and the possibility of our species extinguishing not only other species (e.g. through loss of biodiversity, climate change, and WMD proliferation), but itself.

Thus, for example, although a legal right may exist for a pharmaceutical company to sue a generic manufacturer for a violation of patent rights, a lawyer would be well within her professional role to advise the client that moral and *commercial* reasons make it unwise to press the legal case. In fact, the failure to take such sensible advice resulted in the scandalously bad press and reputational damage suffered by pharmaceutical companies until the Doha Agreement,<sup>49</sup> tiered pricing schemes, and philanthropy reversed much of the damage and saved many lives in poor countries.

Business leadership, when reinforced by CSR Lawyering, has yielded mutual learning and the emergence of creative new approaches and solutions. This has happened to some extent (but not nearly an adequate extent) regarding

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47. *A Guide for Integrating Human Rights Into Business Management* (2006), available at [www.blihr.org](http://www.blihr.org). (A new edition of this Guide will be published during the latter half of 2008).

48. This is not the place to review the evidence that values-driven companies embracing CSR and stakeholder perspectives are more successful, but that evidence from the socially responsible investment sector, numerous academic studies and metastudies, and otherwise is compelling. See, e.g., Henry Blodget, *The Conscientious Investor*, ATLANTIC MONTHLY, Oct. 2007, available at <http://www.theatlantic.com/doc/200710/socially-responsible-investing>; see also Marjorie Kelly, *Holy Grail Found: Absolute, Positive, Definitive Proof CSR Pays Off Financially*, 18 BUS. ETHICS MAG. (Winter 2004).

49. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (affirming that the Trade Related Intellectual Property Rights Agreement allows balancing public health and intellectual property interests).

the global health problems involving HIV/AIDS and the pharmaceutical companies, issues confronting the extractive industries in emerging economies in places such as Chad and Nigeria, conflict situations involving mining companies in places such as the Congo and Sudan, and child and forced labor issues facing the footwear and apparel industry.

Business leadership in human rights requires, to some extent, a level playing field. Robert Haas, longtime Chairman of Levi Strauss & Co., recognizes the collective action problem inherent in CSR; in his remarks in this issue he calls upon business “to work with governments and other stakeholders, to develop a mandatory framework that defines business’s role in human rights, contains reporting and enforcement mechanisms and includes consequences for non compliance.”<sup>50</sup> Lawyers, therefore, play a crucial facilitator role in creating and advancing more effective global legal frameworks—like the U.N. Norms<sup>51</sup> yet more concrete, practical, and actionable—to remedy this collective action problem and level the playing field by a combination of rationalized standards and enhanced enforcement.

A final difficult but cardinal virtue for CSR lawyering is thus *courage*: the courage to stand up for one’s convictions, bring the ethical considerations and CSR standards to bear, and raise issues of good public policy, even forcefully if necessary, in ways that might even threaten one’s career and position. As hard as this may be to do, it defines the good lawyer, the good person, and the good company.

Lawyers are no less subject to, and may even be more subject to, the organizational pressures to deliver a decision, buttressed by a persuasive selection of legal materials, that allows a corporation to be oblivious to the consequences of its actions other than for short-term shareholder profit. Corporate history is littered with the remnants of once-great businesses that succumbed to such thinking. Now more than ever, in the new era of unparalleled interconnectedness (and scrutiny), such conduct is a mistake. As argued throughout this essay, the risks of raising the issues may in fact be less than the risks of not raising the issues and seeing damage done to the company or stakeholders, or opportunities for greater value lost.

At this time of great need to explore new solutions to growing global problems that threaten us all, lawyers, law students, professors, judges, and businesspeople seeking to implement CSR principles could do worse than to adhere to Thoreau’s injunction to be like other explorers, which we may paraphrase as: “Be an explorer to whole new continents and worlds within you, opening new channels not of trade, but of thought and feeling.”<sup>52</sup>

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50. See Robert Haas’s Article in this issue.

51. See *supra* note 15.

52. Thoreau’s original was: “Be a Columbus to whole new continents and worlds within you, opening new channels, not of trade, but of thought.”